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JUL 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1896

IN THE

Supreme Court of the United States

October Term, 1983

MOBIL OIL CORPORATION,

Petitioner,

vs.

JERRY A. BLANTON, ROY H. HEALEY,

Respondents.

REPLY OF MOBIL OIL CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the words of this Court, *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964) should be overruled to "eliminate treble damages from private state court suits masquerading as antitrust actions." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. ___, 52 U.S.L.W. 4821, 4828 (June 19, 1984). In striking down the doctrine of intracorporate conspiracy as an offending masquerader, this Court in *Copperweld* re-emphasized a fundamental premise of federal antitrust law:

> "'... antitrust laws ... were enacted for "the protection of *competition* not *competitors*."' *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ... (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))."
>
> 52 U.S.L.W. at 4825, n. 14.

This fundamental limitation on federal antitrust laws was central to Mobil's argument on appeal that as a mat-

ter of law no injury to competition can result from an attempt to monopolize a "relevant" market defined without regard to the functional inter-changeability of products as used by consumers. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 343, 395 (1956). The Ninth Circuit refused to confront this argument choosing instead to hide behind the *Lessig* "mask" which treats relevant market as immaterial in a Section 2 attempted monopoly claim. 327 F.2d at 474.

Having had their attempted monopoly judgment affirmed by the Ninth Circuit on the basis of the *Lessig* rule, Respondents' opposition attempts to disclaim the importance and vitality of that anomalous rule. While this eagerness to abjure the *Lessig* incantation outside of its Ninth Circuit confines is easily understood, if *Lessig* falls, the Respondents' judgment falls with it.

Respondents cannot, however, disguise the simple fact that, relying on *Lessig*, the Ninth Circuit refused to consider Mobil's argument that sales of fungible automotive products to Mobil dealers is not a relevant market. This conclusion is compelled under principles enunciated by this Court in *United States v. E. I. du Pont de Nemours & Co.*, *supra*, as well as the relevant market authorities of the Ninth Circuit itself. *See e.g.*, *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011, 1016 (9th Cir. 1983); *cert. denied*, ____ U.S. ____, 104 S.Ct. 106 (1983).[1] Indeed, every automotive products case which

[1]Contrary to Respondents' assertion and the Ninth Circuit Panel's characterization — 721 F.2d at 1214; Appendix, A-12 — Mobil did not argue that respondents "abandoned" *Lessig* below. Rather, Mobil simply pointed out that it is improper to affirm a judgment on appeal on a theory never presented to the jury at trial. Appellant's Combined Reply Brief and Answering Brief, p. 9; *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

has addressed the Respondents' theory on its merit has rejected it.[2]

Respondents' jury verdict was upheld by the Ninth Circuit because the panel did *not* confront the relevant market issue:

> "We need not resolve the legal question presented by Mobil because it is clear that the jury's attempted monopolization finding may be sustained under *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied* 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed. 2d 1044 (1964), and its progeny."
>
> 721 F.2d at 1213; Appendix to Petition A-11.

This use of *Lessig* is not a mere "reference" nor is it *dicta*. It is the *ratio decidendi* of the affirmance which Respondents argue should remain undisturbed. The Ninth Circuit Panel left no doubt on this point:

> "Although the *Lessig* doctrine has been subject to criticism, it is the law of this circuit, and we are bound to follow it."
>
> 721 F.2d at 1214; Appendix to Petition A-12.

To divert attention from *Lessig*, Respondents argue Mobil erroneously asserts that this case involves a "'Single Brand.'" Respondents' Opposition, p. 9. Respondents' argument cannot obscure that under *du Pont*, *supra*, as well as the law of all circuits save the *Lessig* exception, sales to Mobil dealers, by Mobil or otherwise,

[2]*Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 118 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 296 (7th Cir. 1974); *South End Oil v. Texaco, Inc.*, 237 F.Supp. 650, 656 (N.D. Ill. 1965); *Metts v. Clark Oil & Refining Corp.*, 1981-1 Trade Cases ¶ 64,148 (Mo. Ct.App. 1981); *Tire Sales Corp. v. Cities Service Oil Co.*, 410 F.Supp. 1222 (N.D. Ill. 1976), *rev'd on other grounds*, 637 F.2d 467 (7th Cir. 1980); *Blackwell v. Power Test Corp.*, 1982-2 Trade Cases ¶ 64,929 (D.N.J. 1982).

is not a relevant market.[3] The functional interchangeability of automotive oils, accessories and supplies precludes another conclusion. The control of sales to only a portion of the relevant market [*i.e.*, Mobil dealers] is not "Monopoly power" — "the power to control prices or exclude competition." *du Pont, supra*, 351 U.S. at 391 (footnote omitted).

Unable to seriously dispute that *Lessig* is law only in the Ninth Circuit, or that it is inconsistent with the interpretation of the Sherman Act Section 2 applied in every circuit in the United States,[4] Respondents suggest that *Lessig* is in accord with the decisions of this Court, and principles enunciated in *Standard Oil Company of New Jersey, et al. v. United States*, 221 U.S. 1 (1911). Respondents' Opposition pp. 16-18. To the contrary, as recently as June of this year, this Court once again emphasized:

> "The conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization."
>
> *Copperweld Corp. v. Independence Tube Corp., supra*, 52 U.S.L.W. at 4825 (footnote omitted).

Lessig as applied by the Ninth Circuit in the instant case for the first time, imposes liability for an "attempt to monopolize" which did not and could not threaten actual monopolization. Respondents' arguments do not address this point. Instead, they argue that the injury to competition which is presumed in Section 1 *per se* violations satisfies the Section 2 requirement of dangerous probability of successful monopolization. Respondents' Opposition p. 17. It does not. Sections 1 and 2 of the Sherman Act are different and distinct:

> "The point remains, however, that purely unilateral conduct is illegal only under §2 and not under §1. Monopolization without conspiracy is unlawful under §2, but restraint of trade without a conspiracy or combination is not unlawful under §1."
>
> *Copperweld, supra*, at 4825, n. 13.

Thus, Respondents' arguments merely point up what Mobil has argued all along: the *Lessig* rule converts Section 1 violations, *without more*, into violations of the Section 2 prohibition of attempted monopoly.

This case, expressly affirmed on the basis of *Lessig*, is the appropriate vehicle to put that inconsistent rule finally to rest. Its demise "will ... not cripple antitrust enforcement. It will simply eliminate treble damages from private state tort suits masquerading as antitrust actions." *Copperweld, supra*, at 4825.

Dated: July 17, 1984

Respectfully submitted,

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[3] *See, e.g., Tire Sales Corp. v. Cities Service Oil Co., supra*: "The relevant market can be defined no narrower than the wholesale market of TBA [Tires, Batteries and Accessories] on the South side of Chicago." 410 F.Supp. at 1230.

[4] Criticism of *Lessig* outside the Ninth Circuit continues, most recently in *American Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350, 1366-67 (Fed. Cir. 1984).